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Before the
Federal Communications Commission
Washington, D.C. 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of	)	
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Rural Telecommunications Group, Inc.	)	
	)	
Petition for Rulemaking	)	RM No.
To Impose a Spectrum	)	
Aggregation Limit on all Commercial	)	
Terrestrial Wireless Spectrum	)	
Below 2.3 GHz	)	
	)	

Rural Telecommunications Group, Inc. Petition for Rulemaking

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Table of Contents

Summary

The Rural Telecommunications Group, Inc. ("RTG") requests that the Commission initiate a rulemaking proceeding aimed at the adoption of a spectrum aggregation limit for wireless spectrum. RTG proposes the imposition, on a county level, of a 110 Megahertz aggregation limit for all commercial terrestrial wireless spectrum below 2.3 GHz.

Due to a change in market conditions since 2001, when the FCC determined that a spectrum aggregation limit was no longer necessary, a spectrum cap is once again necessary to limit the ability of carriers to leverage their market power to impede competition. Since 2001, the wireless industry has experienced unprecedented consolidation. The last seven years have seen more than a dozen mergers or acquisitions involving wireless carriers. This consolidation has harmed smaller, rural carriers, resulting in the inability of many such carriers to effectively compete. In turn, this has harmed consumers living in rural America by driving their costs for roaming services higher and giving them fewer options for service.

Data from FCC CMRS competition reports shows that the CMRS market has become substantially less competitive, and the results of recent spectrum auctions indicate that the trend toward market dominance by a few larger carriers will only continue. Indeed, in the most recently concluded and most significant auction of spectrum in recent years, two of the top four wireless carriers – Verizon Wireless and AT&T – combined won approximately 60 percent of total MHz-POPs.

Larger carriers have abused their market power in rural markets by forcing smaller carriers into unreasonable roaming arrangements, and the inability to reach reasonable roaming arrangements has driven some smaller carriers out of the market. A spectrum cap will prevent such abuse and allow small, rural carriers to access spectrum that can be used to provide service to remote areas that larger carriers have been unwilling to serve.

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Rural Telecommunications Group, Inc.	)	
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Petition for Rulemaking To Impose a Spectrum Aggregation Limit on all Commercial Terrestrial Wireless Spectrum Below 2.3 GHz	)	RM No.

Rural Telecommunications Group, Inc.
Petition for Rulemaking

Pursuant to Section 1.401 of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission"),[1] the Rural Telecommunications Group, Inc. ("RTG"), by its attorneys, respectfully requests that the FCC initiate a rulemaking to consider the adoption of a spectrum aggregation limit for wireless spectrum.[2] Specifically, RTG proposes that the FCC impose, on a county level, a 110 MHz aggregation limit on all commercial terrestrial wireless spectrum below 2.3 GHz.

I. Statement of Interest

RTG is a Section 501(c)(6) trade association dedicated to promoting wireless opportunities for rural telecommunications companies through advocacy and education in a manner that best represents the interests of its membership. RTG's members have joined together to speed delivery of new, efficient, and innovative telecommunications technologies to

[1] 47 C.F.R. § 1.401.

[2] 47 C.F.R. §1.903.

the populations of remote and underserved sections of the country. RTG's members are small, rural businesses serving or seeking to serve secondary, tertiary and rural markets. RTG's members are comprised of both independent wireless carriers and wireless carriers that are affiliated with rural telephone companies.

RTG is deeply concerned about competitive imbalances in the provision of wireless telecommunications service in rural America. As discussed below, in the absence of a spectrum cap, the interests of RTG's members will be adversely affected as they attempt to obtain spectrum and compete on an unlevel playing field against consolidated nationwide wireless carriers who possess greater resources and economies of scale.

II. Discussion

RTG respectfully requests that the FCC adopt a spectrum aggregation limit (*i.e.*, a "spectrum cap"). Due to a change in market conditions since 2001, when the Commission determined that a spectrum aggregation limit was no longer necessary, a spectrum cap is once again necessary to limit the ability of carriers to leverage their market power to impede competition. As discussed below, recent consolidation in the CMRS marketplace has created the conditions which the Commission has previously found to justify a spectrum cap. In addition, the spectrum cap should be adjusted to reflect the additional commercial mobile radio spectrum that has been auctioned by the Commission in the past few years. As discussed further below, RTG believes that a 110 megahertz cap on the amount of commercial terrestrial wireless spectrum below 2.3 GHz that a carrier may hold within a county will effectively safeguard the public interest in a competitive CMRS marketplace without unduly restricting spectrum aggregation.[3]

[3] In addition to its spectrum cap proposal set forth herein, RTG, in its comments filed June 20, 2008 in the 700 MHz D Block proceeding, WT Docket No. 06-150 and PS Docket No. 06-229,

a. A Spectrum Cap is Necessary Due to Changing Market Conditions

The FCC's spectrum cap was established in 1994 in recognition of the need to promote and protect competition in CMRS markets. The FCC adopted the cap to add certainty to the marketplace without sacrificing the benefits of pro-competitive and efficiency-enhancing aggregation.[4] At that time, the Commission feared that if licensees were to aggregate sufficient amounts of CMRS spectrum, it would be possible for them to effectively "exclude efficient competitors, reduce the quantity of service available to the public and increase prices to the detriment of consumers."[5] The Commission found that a limit on the amount of covered spectrum that a single entity could control in any one geographic area would limit the ability of any entity to increase prices artificially and would prevent licensees from artificially withholding capacity from the marketplace by warehousing spectrum. Accordingly, the FCC established a 45 megahertz spectrum aggregation limit to ensure that the CMRS marketplace remained competitive and to preserve incentives for efficiency and innovation.[6]

In 2001, upon review of the CMRS market, the FCC decided to sunset the spectrum cap, effective January 1, 2003. The FCC found that meaningful economic

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requested that the Commission adopt an interim 24 megahertz spectrum aggregation limit for 700 MHz spectrum. *See* Comments of the Rural Telecommunications Group, Inc. at pp. 8-11.

[4] *Implementation of Sections 3(N) and 332 of the Communications Act, Regulatory Treatment of Mobile Services,* GN Docket No. 93-252, *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band,* PR Docket No. 93-144, *Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool,* PR Docket No. 89-553, Third Report and Order, par. 248 (rel. September 23, 1994) *("CMRS Third Report and Order").*

[5] *Id.*

[6] *Id.* at par. 251.

competition in the CMRS marketplace existed and that CMRS markets had experienced strong growth, increased competition, and active innovation. The FCC based its findings on the increase in people living in counties served by six or more and seven or more providers[7], and the fall in market concentration, as evidenced by a decrease in the Herfindahl-Hirschman Indices ("HHIs").[8] The FCC found that the CMRS industry had realized the goals of the Telecommunications Act of 1996. The FCC concluded, therefore, that the spectrum cap was no longer necessary to protect CMRS consumers from anti-competitive behavior, though it recognized the possibility that additional consolidation of control over spectrum could have "serious anticompetitive effects."[9]

Since 2001, the wireless market has once again undergone dramatic changes, this time to the detriment of the consumer. More than a dozen mergers or acquisitions have occurred since 2001 involving wireless carriers. Some of the major mergers or acquisitions have included NextWave Personal Communications, Inc. with Cingular Wireless LLC,[10] Cingular Wireless

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[7] The FCC's reliance on the existence of these numbers of providers is somewhat misplaced. As Commissioner Michaël Copps noted in his dissent, the FCC counted a county as "covered" if a mobile provider was offering service in *any* portion of the county. Assuming the existence of an additional competitor throughout a county where such competitor may serve only a handful of customers at the geographic edge of such county hardly provides the basis for the Commission's conclusions.

[8] *2000 Biennial Regulatory Review, Spectrum Aggregation Limits for Commercial Mobile Radio Services*, Report and Order, WT Docket No. 01-14. par. 31-32 (rel. December 18, 2001) ("*2001 Spectrum Cap Order*").

[9] *2001 Spectrum Cap Order* at par. 55.

[10] *See In the Matter of Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in Possession, to subsidiaries of Cingular Wireless LLC*, WT Docket 03-217, Memorandum Opinion and Order, FCC 04-26 (February 11, 2004).

Corp. (Cingular) with AT&T Wireless Services, Inc. (AT&T),[11] Alltel Corp. (Alltel) with Western Wireless Corp.,[12] Nextel Communications, Inc. with Sprint Corp.,[13] AT&T Inc. with BellSouth Corporation,[14] AT&T Inc. with Dobson Communications Corporation,[15] T-Mobile and SunCom Wireless,[16] and AT&T and Aloha Partners.[17] Mergers between Verizon Wireless and Rural Cellular Corporation, and Verizon Wireless and Alltel Corporation, have been proposed and requests for approval remain pending.[18] Additionally, Verizon and Alltel have acquired numerous Tier III wireless carriers since 2001.[19]

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[11] *See In re Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, WT Docket No. 04-70, et. al., FCC 04-255 (released October 26, 2004) ("*Cingular/AWS Order*").

[12] *See In the Matter of Applications of Western Wireless Corporation and ALLTEL Corporation For Consent to Transfer Control of Licenses and Authorizations File Nos. 0002016468, et al.*, WT Docket 05-50, Memorandum Opinion and Order, FCC 05-138 (July 11, 2005).

[13] *See In the Matter of Applications of Nextel Communications, Inc. and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations File Nos. 0002031766, et al.*, WT Docket 05-63 , Memorandum Opinion and Order, FCC 05-148 (August 3, 2005).

[14] *In re AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* WC Docket No. 06-74, Memorandum Opinion and Order, FCC 06-189 (March 26, 2007).

[15] *In re AT&T Inc. and Dobson Communications Corporation for Consent to Transfer Control of Licenses and Authorizations,* Memorandum Opinion and Order, WT Docket No. 07-153 (November 19, 2007).

[16] *Applications of T-Mobile USA, Inc. and SunCom Wireless Holdings, Inc. For Consent to Transfer Control of Licenses and Authorizations and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act,* Memorandum Opinion and Order, WT Docket No. 07-237 (rel. February 8, 2008).

[17] *Application of Aloha Spectrum Holdings Company LLC (Assignor) and AT&T Mobility II LLC (Assignee) Seeking FCC Consent for Assignment of Licenses and Authorizations*, Memorandum Opinion and Order, WT Docket No. 07-265 (rel. February 4, 2008).

[18] *Verizon Wireless and Rural Cellular Corporation Seek FCC Consent to Transfer Control of Licenses, Spectrum Manager Leases, and Authorizations,* Public Notice, WT Docket No. 07-208, DA-07 4192 (October 11, 2007); *Verizon Wireless and Atlantis Holdings LLC Seek FCC Consent to Transfer Licenses, Spectrum Manager and De Facto Transfer Leasing Arrangements,*

Over the past seven years, the wireless industry has experience unprecedented consolidation. This consolidation has had an anti-competitive effect on the wireless market. These large carriers now have even greater market power and they have been exerting this market power to the detriment of smaller, rural carriers and consumers. Many small and/or rural carriers can no longer compete with such large carriers. The inability of small carriers to compete resulting from this consolidation is driving the smaller carriers out of business. Several small, rural wireless carriers have recently sold their assets and transferred their licenses to large nationwide carriers, reducing consumer choice and diversity. For example, Public Service

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and Authorizations, and Request a Declaratory Ruling on Foreign Ownership, Public Notice, WT Docket No. 09-85, DA 08-1481 (June 25, 2008).

[19] *See, e.g., Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from Urban Comm-North Carolina, Inc., debtor-in-possession, to Cellco Partnership d/b/a Verizon Wireless*, 20 FCC Rcd 10440 (WTB 2005); *Wireless Telecommunications Bureau and International Bureau Grant Consent For Assignment or Transfer of Control of Wireless Licenses and Authorizations from Price Communications Corporation to Cellco Partnership d/b/a Verizon Wireless*, Public Notice, DA 01-791 (rel. Mar. 30, 2001); *Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, Action De Facto Transfer Lease Applications and Spectrum Manager Lease Notifications*, Report No. 2056, Public Notice (January 26, 2005); *In the Matter of Applications of Western Wireless Corporation and ALLTEL Corporation For Consent to Transfer Control of Licenses and Authorizations File Nos. 0002016468, et al.*, WT Docket 05-50, Memorandum Opinion and Order, FCC 05-138 (July 11, 2005); *WTB Grants Consent For The Transfer Of Control Of Licenses From CenturyTel, Inc. To ALLTEL Communications, Inc.*, WT Docket 05-50, Public Notice, DA 02-1366 (June 12, 2002); *In the Matter of Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc., For Consent to Transfer Control of Licenses and Authorizations File Nos. 0002391997, et al. and Application of Great Western Cellular Partners, L.L.C. and ALLTEL Communications, Inc., For Consent to Transfer Control of License*, WT Docket 05-339, Memorandum Opinion and Order, FCC 06-146 (October 2, 2006); *Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, Action De Facto Transfer Lease Applications and Spectrum Manager Lease Notifications*, Report No. 2062, Public Notice (February 2, 2005). *See also Twelfth Report* at par. 66 (announcement of Sprint Nextel agreement to acquire Northern PCS Services, LLC).

Cellular, Inc. sold its assets to Alltel in 2004 because it could no longer provide quality wireless services at reasonable prices in contrast to its larger competitors. Minnesota Southern Wireless Company d/b/a Hickory Tech Wireless, as a result of an inability to obtain a long term roaming agreement with AT&T, sold its assets to Western Wireless Corporation ("Western Wireless") in 2004. As a result of the merger of Western Wireless and Alltel, Great Lakes of Iowa, Inc. lost its roaming agreement with Western Wireless in the rural Iowa 15 market and, as a result of its inability to negotiate a good faith roaming agreement with either Alltel or Verizon Wireless, it was forced in late 2005 to exit the wireless business.[20]

In its Eleventh Report to Congress on competition in the CMRS market issued in 2006,[21] the FCC declared that the CMRS market was once again subject to "effective competition" for the eleventh year in a row. However, the Eleventh Report represents the first time since 1998 when carriers and the FCC began calculating the HHI where the HHI in *all* 25 of the top 25 CMRS markets has increased, indicating that the CMRS market has reversed itself and is becoming less competitive. Allowing a dwindling number of nationwide carriers to continue to stockpile spectrum[22] now that the CMRS market pendulum is swinging away from robust

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[20] The purchaser of the Great Lakes assets was Long Lines Wireless, which almost immediately turned and sold those assets to U.S. Cellular.

[21] *In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, WT Docket No. 06-17, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Eleventh Report, FCC 06-142 (September 29, 2006) ("Eleventh Report").

[22] In eliminating the spectrum cap, the FCC expressed concern over the possibility that carriers may hold excess spectrum in order to deter competitive entry. An examination of today's CMRS marketplace strongly suggests that such spectrum warehousing is occurring. Many portions of rural America remain unserved or underserved because large, nationwide carriers have no economic incentive to serve sparsely populated areas. The FCC's methodology of measuring the number of competitors per county does not account for outlying areas of counties that may not be served by multiple CMRS providers. While the more densely populated towns in rural regions may have effective competition, less populated regions often lack service. While measuring this

competition is contrary to the public interest. Further, as discussed in more detail below, this measured shift in the CMRS market toward consolidation is reflected in the results of the recent auctions of AWS ("Auction 66") and 700 MHz ("Auction 73") spectrum and adversely affects the market for wholesale roaming.

The Appendices to the FCC's annual CMRS competition reports provide the HHI of Economic Areas (EAs) throughout the United States. The HHI is a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in a market, and then summing the resulting numbers. The higher the HHI, the more concentrated an industry is. While the HHI is not the sole measure of competition, it is a useful tool and was used in the past, when the HHI was declining in the top 25 CMRS markets, to justify the lifting of the spectrum cap.[23]

Based on the FCC's most recent CMRS competition reports,[24] RTG has calculated the change in HHIs since 2003 in both rural and urban CMRS markets. HHI figures show that since

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lack of service has proven problematic, most consumers can verify on an anecdotal level that CMRS coverage is lacking once one exits the interstate in many rural regions. Large carriers, driven by profit motive and a fiduciary duty to their shareholders are obviously reluctant to spend capital in remote regions even though they have paid for the spectrum in such regions. The only economic advantage in holding onto such spectrum is that it prohibits competitive entry by rural carriers able to make a business case to serve more remote, less densely populated regions.

The lack of meaningful secondary market spectrum, as well as a dearth of leasing and partitioning deals, indicates that large carriers are content to warehouse their spectrum rather than release it to potential competitors. In these instances, the economic value of holding excess spectrum outweighs possible leasing or partitioning revenue. The results of the recent AWS and 700 MHz auctions, discussed below, illustrate the tendency of the same CMRS players to continue to stockpile spectrum. Their willingness to pay more for spectrum than potential new competitors suggests an economic value in deterring competitive entry.

[23] *See 2001 Spectrum Cap Order* at ¶ 86.

[24] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial*

2003, the CMRS market has become substantially less competitive. Between 2003 and 2006, the average HHI in the top 25 markets increased by 27.6%, while the average HHI in markets with a population density below 100 persons per square mile increased by 11.67% during this same period.[25] The HHI continues to increase on a nationwide basis. Given the consolidation and acquisitions that have occurred since 2006 and the trend toward further consolidations that is likely to continue, the HHI index is likely to continue to increase.

Based on the results of the Commission's latest auctions of AWS spectrum in Auction 66 and 700 MHz spectrum in Auction 73, further consolidation of the CMRS market is a definite trend. An examination of the AWS auction results, specifically the number of designated entities who were successful in acquiring valuable spectrum in Auction 66, reveals that even more spectrum is ending up in the hands of mostly large, nationwide carriers. The designated entity share of Auction 66 winnings, as a percentage of net winning bids, was just four percent of the auction total. This is the lowest result in *any* Commission auction where the Commission used designated entity preferences. The large, nationwide carriers who already had the most spectrum were able to leverage their old and acquired spectrum in order to finance the purchase of new AWS spectrum.

Mobile Services, Twelfth Report, WT Docket No. 07-71 (rel. February 4, 2008) ("*Twelfth Report*") at Table A-3; Eleventh Report at Table 3 (documenting the 2005 HHI for Economic Areas); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Tenth Report, WT Docket No. 05-71 (rel. September 30, 2005) at Table 3; *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Ninth Report, WT Docket No. 04-111 (rel. September 28, 2004) at Table 3.

[25] *Id.* The top 25 markets were determined based on EA density. The FCC has adopted a "baseline" definition of rural as a county with a population of 100 persons or fewer per square mile. Because HHI data was not available broken down by county, for purposes of its HHI analysis, RTG adopted a rural definition of an EA with a population of fewer than 100 persons per square mile.

The top four national wireless service providers dominated Auction 66. Cellco Partnerships d/b/a Verizon Wireless, Cingular AWS, LLC, T-Mobile License LLC, and SpectrumCo LLC (composed of Sprint and cable companies) accounted for 78 percent of all winning bids in Auction 66. In the most recently concluded and most significant auction of spectrum in recent years, the auction of 700 MHz spectrum, two of the top four wireless carriers – Verizon Wireless and AT&T – combined won approximately *60 percent* of total MHz-POPs.

Rather than ease industry concentration as the Commission speculated when it eliminated spectrum caps,[26] Auction 66 and Auction 73 have resulted in the largest carriers garnering even more spectrum, giving them increased opportunities to engage in anticompetitive behavior. The results of these auctions demonstrate the unfettered ability of just a few concentrated carriers to acquire huge swathes of spectrum. Without a spectrum cap, this disturbing trend will continue. Based on recent competitive data, discussed above, and the results of the AWS-1 and 700 MHz auction, the CMRS industry has reached the point where, as the Commission recognized, "significant additional consolidation over spectrum could have serious anticompetitive effects."[27]

Industry consolidation spurred on by rampant consolidation with no spectrum cap to rein in acquisitions also adversely affects the market for wholesale roaming agreements. Because regional and local carriers offer a small footprint, they are limited to partnering with other carriers through automatic roaming agreements if they wish to offer their subscribers expanded coverage. The current CMRS market for roaming is no longer competitive where smaller, rural carriers are providing service. In rural regions, large carriers have been able to abuse their

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[26] *See 2001 Spectrum Cap Order* at ¶ 76 (where the Commission incorrectly predicted that the future allocation of AWS spectrum would increase the amount of spectrum that would be available within the next few years, which would in turn discourage anticompetitive behavior).

[27] *2001 Spectrum Cap Order* at ¶ 55.

overwhelming market power, forcing rural carriers into roaming agreements that are little more than contracts of adhesion where rural carrier customers must pay an unreasonable premium to roam on a nationwide network, and where nationwide carriers often pay less than the rural carrier's costs for the nationwide carriers' customers to roam on the rural network. In urban and suburban regions, large carriers' roaming agreements are reciprocal and bear some relationship to the carriers' costs. However, such agreements are not generally available to smaller, rural carriers in rural areas where nationwide carriers have an overwhelming market advantage.[28]

As the Commission's *Twelfth Report* notes, the number of carriers in rural regions is substantially less than in non-rural regions.[29] In comparing competitive entry in counties with population densities of 100 persons per square mile or less to counties with densities greater than 100 persons per square mile, the FCC found that the less densely populated counties have an average of 3.6 mobile competitors, while the more densely populated counties average 4.3 competitors.[30] The lower number of available roaming partners in rural areas is exacerbated by technological distinctions that affect roaming.

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[28] *See generally* The Rural Telecommunications Group, Inc., Comments in Opposition, WT Docket No. 05-50, filed March 9, 2005 ("RTG Opposition"); *Cingular/AWS Order* at ¶ 171; Kaplan Telephone Company, Informal Objection and Request for Commission Action, WT Docket No. 04-70, filed September 27, 2004; Public Service Communications, Notice of Ex Parte Presentation, WT Docket No. 04-70, filed September 9, 2004; Snake River Personal Communications Services, Informal Request for Commission Action, WT Docket No. 04-264, filed September 13, 2004; Lamar County Cellular, Petition to Deny, WT Docket No. 05-50, filed March 9, 2005.

[29] *See Twelfth Report* at ¶ 105.

[30] *Id.* RTG again reminds the Commission of the misleading nature of these numbers. As discussed in note 7 *supra*, counting a county as served by a mobile service provider if *any* portion of that county, no matter how small, is served by such provider assumes greater competition in such county than may effectively exist. *See 2001 Spectrum Cap Order* at Commissioner Copps Dissent.

Consolidation has reduced from three to two the number of nationwide carriers using global system for mobile communications ("GSM") as their digital standard (AT&T and T-Mobile).[31] Likewise, the Commission has recognized that currently there are only two nationwide Code Division Multiple Access ("CDMA") carriers (Verizon Wireless and Sprint).[32] This has created a market scenario where a virtual duopoly controls each CMRS technology type. The FCC has recognized that "...GSM carriers do not have the ability to roam with CDMA carriers, and vice versa."[33] Thus, the number of roaming options for small carriers and their customers is dwindling. Further, as applications are developed for AWS, the same carriers who are unwilling in many cases to provide roaming to rural carriers and their customers can exercise the same market dominance when it comes to the use of AWS applications when customers roam outside of their home areas.

As the industry has consolidated and competitive roaming options have dried up, small carriers have seen a decline in the roaming rates that nationwide carriers are willing to pay. This decline in the rates large carriers are willing to pay makes economic sense up to a point due to reduced demand for rural roaming services. However, the rates that large carriers are demanding for rural consumers to roam on their networks result from the large carriers' ability to leverage their market power in an unfair manner. As long as these large carriers can acquire ever more

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[31] *See, e.g., in re Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations,* WT Docket No. 04-70, et. al., FCC 04-255 (October 22, 2004) ("*AT&T/Cingular Order*").

[32] *Id.*

[33] *Id.* at ¶ 175.

spectrum, new competitors and smaller competitors will wither on the vine and large carriers will have even more market power, enabling them to engage in anticompetitive tactics.[34]

b. A Spectrum Cap Will Serve the Public Interest, Convenience, and Necessity

RTG urges the FCC to adopt a spectrum cap to curtail the recent anti-competitive consolidation in the wireless market discussed above. Excessive concentration of licenses contradicts the Commission's stated goal of avoiding such concentration, and undermines its goal of diversity among licensees.[35] A limit on the amount of spectrum that any one carrier can hold will promote competition and diversity in furtherance of the public interest.[36] In addition to the promotion of competition and diversity, the FCC has recognized other public interest benefits resulting from a spectrum cap, such as providing parties with guidance regarding what

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[34] In eliminating the spectrum cap, the FCC expressed concern that "tacit collusion" would be a possible result. The current state of the competitive roaming market suggests that this is exactly what has happened. Large carriers are willing to ferociously compete for customers in urban and suburban areas. However, as discussed above, in rural areas, large carriers appear content to use roaming agreements between one another to provide service, thus saving on infrastructure costs. Large carriers share reasonable roaming rates and terms with one another, almost as if they are members of an exclusive clique, relegating small and rural competitors to unreasonable roaming agreements or outright bans on "in-region" roaming. It would seem that there is a tacit understanding to "share" higher cost rural regions through roaming, rather than compete.

[35] *See CMRS Third Report and Order*. In awarding licenses, one of the Commission's statutory objectives is "promoting economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(3)(B).

[36] *CMRS Third Report and Order* at p. 8100 (rules limiting spectrum aggregation "seek to promote diversity and competition in mobile services, by recognizing the possibility that mobile service licensees might exert undue market power or inhibit market entry by other service providers if permitted to aggregate large amounts of spectrum.").

transactions the Commission would likely consider to be in the public interest, allowing parties to structure their transactions to fall within the rule, and providing guidance for the FCC itself.[37]

A spectrum cap would eliminate the hoarding of spectrum by an ever-dwindling number of large entities who increasingly offer the same products and services in lockstep fashion. Smaller regional CMRS carriers such as Cricket and Metro PCS offer flexible buckets of minutes, pre-paid plans, and other innovative plans and options. Cricket, for example, offers local calling areas similar to local, landline service. This option allows customers to seriously consider "cutting the cord" and going 100 percent wireless. Metro PCS offers flat rates and no contracts. This is in direct contrast to the large, nationwide carriers' reliance upon multi-year contracts to lock in their customers.

Both Cricket and Metro PCS also offer business plans that appeal to budget-conscious small businesses, rather than large corporations. A spectrum cap is needed in order to allow new entrants and smaller carriers such as Cricket and Metro PCS to flourish and continue to offer compelling alternatives to the large, nationwide carriers.[38]

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[37] *2001 Spectrum Cap Order* at par. 56.

[38] In comments filed June 20, 2008 in the 700 MHz D Block proceeding, WT Docket No. 06-150 and PS Docket No. 06-229, numerous other parties in addition to RTG, including Cricket-parent Leap Wireless International, Inc., support spectrum aggregation limits or eligibility restrictions in order to prevent further excessive aggregation of 700 MHz spectrum. *See* Comments of Leap Wireless International, Inc. at pp 2-8 (Commission should restrict the participation of large entities that already have significant access to 700 MHz spectrum); Comments of the Public Interest Spectrum Coalition at pp. 6-7 (Commission should prohibit bidders from exceeding the existing 95 MHz screen used for merger analysis); Comments of Rural Cellular Association at pp. 3-5 (FCC should limit bidding eligibility to entities that do not already have nationwide or near-nationwide 700 MHz spectrum holdings); Comments of NTCH, Inc. at pp. 13-14 (no single company should be permitted to hold more than 20 MHz of 700 MHz spectrum in any market); Comments of Cellular South , Inc. at pp. 2-3 (Commission should restrict participation in the D Block re-auction using the "spectrum screen" for mergers); Comments of Council Tree Communications, Inc. (Commission should prohibit the national carriers from participating in the D Block reauction); *see also* Comments of Coleman Bazelon (outcome of the 700 MHz

Small, rural carriers also benefit from access to spectrum and a spectrum cap would free up unused spectrum in many rural areas that benefits no one, especially rural consumers. In many cases, rural carriers are the only carriers willing to serve sparsely populated rural regions outside of the towns and highways. Small, rural carriers are especially adept at providing the services and coverage that rural consumers desire and need. Rural carriers generally reside in their service areas and can meet their customers' needs on a personal level. For example, many rural carriers keep their analog networks up and running in order to serve customers at the edges of their networks where analog handsets provide superior coverage. Rural carriers will also take into account the needs of their local public safety officials when determining where to upgrade their networks.[39] To most large, nationwide carriers, the provision of service in rural areas is an afterthought. A spectrum cap will encourage large spectrum hoarders to divest some of their spectrum in rural areas to small, rural carriers who will actually use it.

As discussed above, recent mergers and consolidation in the wireless industry have had an anticompetitive effect on the CMRS marketplace and have resulted in conditions that continue to threaten competition in the CMRS market. These developments were exactly the concerns feared by the Commission when it adopted its initial limits on spectrum aggregation. A spectrum cap will serve the public interest by limiting the ability of carriers with large concentrations of spectrum to use their market power to impede competition or to simply allow their spectrum in rural areas of the country to lie fallow when there are carriers willing to develop such spectrum.

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auction was that AT&T and Verizon won most of the licensed spectrum, and are poised to dominate the market for high capacity, ubiquitous wireless broadband services).

[39] By contrast, the FCC's Phase II E911 location accuracy rules serve as a disincentive for large carriers to build out their networks in rural areas.

c. RTG Proposes a 110 Megahertz Cap On All Spectrum Below 2.3 GHz

Under the FCC's original spectrum cap, no licensee in the broadband PCS, cellular, or SMR services (including all parties under common control) regulated as CMRS was permitted to have an attributable interest in a total of more than 45 Megahertz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS with significant overlap in any geographic area, except that in Rural Service Areas (RSAs), no licensee was permitted to have an attributable interest in a total of more than 55 Megahertz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS with significant overlap in any RSA.[40] The FCC later modified the spectrum cap, raising the aggregation limit to 55 Megahertz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS in all markets.

Although RTG requests that the FCC adopt a spectrum aggregation limit to combat consolidation and anticompetitive practices, RTG recognizes that the wireless market has dramatically changed since the FCC sunset its original spectrum cap. While consolidation has recently stunted competition, the wireless industry has experienced over the past ten years increased competition. The FCC need not adopt such a strict spectrum cap as the one adopted in 1994. A cap of 110 MHz applied only to spectrum below 2.3 GHz is sufficient to address the anticompetitive issues discussed above, while permitting as much concentration as possible before such concentrated ownership would trigger those concerns.[41] A 110 MHz cap is

[40] 47 C.F.R. §20.6.

[41] The FCC has previously found that a spectrum cap of 45 Megahertz is a "minimally intrusive means" for ensuring that the mobile communications marketplace remained competitive. *See 2001 Spectrum Cap Order* at par. 12. Allowing carriers to hold 110 Megahertz of spectrum below 2.3 GHz – over twice the amount of spectrum subject to the previous cap and double the amount of the rural spectrum subject to the previous cap (with no limitations on spectrum above

consistent with the approach taken by the FCC in its *Cingular/AWS Order*, in which the FCC conditioned the grant of the transfer of control of licenses from AT&T Wireless to Cingular upon the completion of divestitures in certain markets that would reduce Cingular's holdings in those counties to no more than 80 Megahertz of cellular and Broadband PCS spectrum.

RTG further requests that the FCC define the relevant geographic area for spectrum cap purposes as a county. Using a county as the relevant geographic area is the most workable solution for a spectrum cap. The FCC has used so many different types of license areas (*e.g.*, RSAs, BTAs, EAs, REAs, MTAs) that, within such areas, the only consistent geographic area is a county. The use of counties is also consistent with the FCC's county-based analysis of spectrum competition in its annual CMRS reports to Congress.

RTG requests that the cap be applied to all commercial terrestrial wireless spectrum below 2.3 GHz, rather than being limited to licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS as it was previously, to more accurately reflect today's competitive market. Licenses in services such as 700 MHz and Advanced Wireless Services ("AWS"), which were not in existence and/or competitive with CMRS at the time of the original spectrum cap, now compete with PCS, cellular and SMR, and should therefore be equally subject to any spectrum cap that the Commission adopts. Licenses in bands above 2.3 GHz, such as Broadband Radio Service ("BRS") and Wireless Communications Services ("WCS") licenses, are in encumbered spectrum. Accordingly, because they will not be used to provide competitive commercial high mobility wireless services in the foreseeable future, there is no reason at this time to subject such licenses to the cap.

2.3 GHz)– is surely far less intrusive, if intrusive at all, than the "minimally intrusive" cap previously adopted.

Accordingly, RTG requests that the FCC adopt a rule that states that no licensee of commercial terrestrial wireless service below 2.3 GHz, including all parties under common control, should have an attributable interest in a total of more than 110 Megahertz of licensed spectrum with any significant overlap in any county.

III. Conclusion

Without adoption of the requested spectrum cap, the wireless market will continue to consolidate, eliminating competitors in small and rural markets and reducing pricing pressures to the detriment of consumers. The requested action is consistent with both the public interest and the Commission's competitive goals. Based on the foregoing, RTG respectfully requests that the Commission initiate a rulemaking to adopt a spectrum aggregation limit for all wireless spectrum below 2.3 GHz.

Respectfully submitted,

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